MOTION FILED
MAY - 4 1978

In The

Supreme Court of the United States

October Term, 1977

No. 77-1275

MARTIN B. GLAUSER DODGE CO.,

Petitioner,

vs.

CHRYSLER CORPORATION, *et al.*,

Respondents.

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

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Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

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Reason for Granting the Writ:

The decision below threatens the business of all independently financed franchised dealers in all oligopolistic industries and the economic and cultural life and independence of our communities, is of great public importance, and should therefore be reviewed by this Court. 6

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MOTION OF *INDEPENDENT DEALERS COMMITTEE DEDICATED TO ACTION* FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITION FOR CERTIORARI

Independent Dealers Committee Dedicated to Action, by its undersigned attorney, moves for leave to file a brief *amicus curiae* in support of the petition for writ of certiorari. The brief which applicant proposes to file accompanies this motion.

Applicant is a national organization of independently financed automobile dealers who as such are interested in this case.

The decision of the United States Court of Appeals for the Third Circuit will have effects extending far beyond the parties,

encompassing all independently financed automobile dealers, for whom applicant is a spokesman, and all independently financed franchised dealers in all oligopolized basic industries. That decision will result in the funnelling of the profits of such franchised dealers out of the communities in which they are located and into the treasuries of the oligopolistic manufacturers, to great public detriment.

This wide impact of the decision below should be before the Court when it considers the petition and it can be presented to the Court more readily by an organization such as applicant than it can by petitioner, which is, perforce, limited in its presentation to the issues which directly affect it.

Respondents have refused their consent to the filing of applicant's proposed brief.

It is therefore respectfully prayed that applicant's motion be granted.

Respectfully submitted,

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BRIEF OF *AMICUS CURIAE, INDEPENDENT DEALERS COMMITTEE DEDICATED TO ACTION* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the district court is reported at 418 F. Supp. 158 and is reproduced at pp. A8-A32 of the separately bound appendix to the petition ("App."). The opinion of the court of appeals is reported at 570 F.2d 72 and is reproduced at App. A33.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 1977 (App. A61). A timely petition for rehearing was denied on December 14, 1977 (App. A63). The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

QUESTION PRESENTED

Where corporations in an oligopolized basic industry, by combination, pursue practices which favor one class of franchised retail dealers over another and permit the favored class of dealers to charge prices on retailed sales lower than those which must be charged by the unfavored dealers, with the result that the unfavored dealers are destroyed and profits are diverted from local dealers and local communities to the oligopolies, are such practices reasonable and not in violation of Section 1 of the Sherman Act because their effect is to make manufacturing profitable while making retail dealership unprofitable?

STATUTES AND RULE INVOLVED

This case involves Section 1 of the Sherman Antitrust Act (hereinafter "the Act"), 26 Stat. 209 as amended by 50 Stat. 693 and 69 Stat. 282, 15 U.S.C. Section 1, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U.S.C. Section 15. Those statutes are printed in the statutary appendix to the petition at p. 46 and are therefore not reproduced here.

STATEMENT OF THE CASE*

This brief of *amicus curiae* is submitted pursuant to leave to file it granted by the Court on the motion of *amicus*, consent having been denied by respondents.

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* The facts stated in this statement are based upon information supplied to counsel by *amicus*.

Amicus is a voluntary association of several hundred privately financed new car dealers (PC's) organized some fifteen years ago by a group of Metropolitan New York Dodge dealers but now of national scope. It was organized in response to what its members believe were and are the predatory and anti-competitive practices of respondents through and with their Dealer Enterprise (DE) dealers.

Amicus has followed the case at bar as one which involved the fortunes of its members and it learned with great concern of the decision of the court below ordering judgment n.o.v. for respondents.

Amicus has learned from petitioner of its petition for a writ of certiorari and has been provided with a copy of the petition and its appendix.

Because of the potential, great adverse effect of the decision below on its membership, who are directly interested in the outcome, *amicus* has decided to submit this brief to the Court to urge upon the Court its views as to the importance of the issues here presented and its reason why the writ should be granted.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW THREATENS THE BUSINESS OF ALL INDEPENDENTLY FINANCED FRANCHISED DEALERS IN ALL OLIGOPOLISTIC INDUSTRIES AND THE ECONOMIC AND CULTURAL LIFE AND INDEPENDENCE OF OUR COMMUNITIES, IS OF GREAT PUBLIC IMPORTANCE, AND SHOULD THEREFORE BE REVIEWED BY THIS COURT.

A.

1. DE dealerships proliferated absolutely and relatively.

In the period from 1964 to 1970, the number of Dodge DE dealerships increased from 105 to 163 and the percent of total Dodge sales done by the DE dealers increased from 12.1% to 18.4% (App. A1).

2. DE dealerships proliferated although they were spectacularly unprofitable.

Total DE profits in 11 months of 1964 were $149,8.. an average of some $1,400 per dealership. In 11 months of 1970, their *losses* were $7,191,781, an average *loss* per DE dealer of some $44,000. For the entire seven year period, all the DE dealerships accrued total *losses* of approximately $10,380,000 (App. A1). Furthermore, these losses occurred even though Chrysler Credit absorbed all repossession losses for the DE's and spared them from making short-term loans to cover cash shortages by absolving the DE's from establishing repossession reserves and permitting the DE's to function on an "out-of-trust" basis for months at a time. Likewise, the DE's consistently reported losses even though they received rent subsidies from Chrysler Realty averaging from $25,000 to $41,500 per year (App. A6).

3. The losses of the DE dealers resulted from the fact that each car they sold (on the average) was sold at a loss.

For the whole seven year period, each sale of a car by a DE dealer resulted in a *loss* of $15.92, on the average (App. A1).

4. The respondents' distribution system was such that it subsidized the losses of the DE dealers and thus enabled them to sell cars at prices resulting in losses, and still to proliferate.

The respondents subsidized the losses and the retail price cutting of the DE dealers by (App. A46-47):

a. Providing financing on more favorable terms than could be obtained in the open market;

b. Providing show-rooms and shops at rentals below what could be obtained in the free rental market;

c. Purchasing DE installment sales contracts on a non-recourse basis;

d. Absorbing the annual losses of DE dealers year after year;

e. Permitting DE dealers to operate in out-of-trust condition, *i.e.*, permitting DE dealers without penalty to sell cars covered by floor inventory plan loans without accounting immediately for the proceeds of the sales;

f. Favoring DE dealers in the delivery of cars for important, factory-advertised promotional events, such as the 1969 Announcement Day. (On this, see also, App. A22.)

5. Respondents' planned subsidization of DE losses permitted DE dealers to sell cars at unnaturally low prices and they did so.

From the facts that the DE dealers suffered constant losses which were subsidized by respondents, and sold cars at per-unit losses, it necessarily follows that the DE dealers, taking advantage of respondents' subsidies, sold cars at retail at unnaturally low prices, which they could not, and would not, have done without the subsidies.

The district court said (App. A19):

> "There was evidence adduced at the trial to show that: (1) Cars were advertised and sold through DE dealers at prices which were lower than private capital dealers . . . could afford to charge. . . ."

The court of appeals said (App. A47): "[T]he jury could have found that the DE dealers did subject private dealers to intense price competition."

6. PC dealers received no subsidies from respondents (App. A46-47).

7. PC dealers could not therefore meet the price competition of the DE dealers and were forced out of business.

"There was sufficient evidence adduced at the trial to permit the jury to infer that as a result of the defendants' preferential treatment of the DE dealers, Glauser Dodge was eventually forced out of business." (App. A18).

In the Southern New Jersey market area, while the percentage of Dodge sales by DE's and former DE's operating in Chrysler subsidized facilities increased from 20% in 1964 to 42.5 percent in 1972, the number of PC dealers, which was 33 in 1964, declined to 22 by 1972. (See Petition, p. 17.)

8. Respondents were able to subsidize and bear the retail losses because they absorbed them at the manufacturing level.

"The program consistently produced net operating losses at the dealer level, but greater market penetration and the resulting increases in production permitting more efficient utilization of manufacturing facilities. Thus, as was explained by plaintiff's expert, Dr. Kuehn, the retail losses were offset by increased profits at the manufacturing level." (App. A12-13).

9. Accepting, as it was obliged to, all of the foregoing facts, the court of appeals nevertheless ordered judgment n.o.v. for respondents because, in its opinion, the restraint of trade, which the jury had found was involved in the above-described situation, was reasonable.

It is difficult to comprehend the rationale behind the result reached by the court below. It would seem fair to say, however, that the essence of its reasoning is embodied in the portion of its opinion reproduced at App. A59-60, and that this reasoning cannot withstand scrutiny.

The court there asks: "whether a manufacturer's subsidization of its partially or wholly owned dealerships [under the circumstances described above] for the purpose of achieving market penetration violates Section 1"?

The court gives this surprising answer to its question: the subsidization does not violate Section 1 because financing might have come to the DE dealers from sources other than respondents, "banks and higher venture capital investment."

While it is *amicus'* purpose here simply to describe what occurred below to demonstrate the vital problem thereby created, it must be said in passing that the court seems to have missed the point. *Only respondents,* able to absorb the DE losses at the manufacturing level, would have financed the continuous

DE losses which resulted from price cutting at the retail level. It is hard to conceive of any "banks and higher private venture capital investment" willing to invest in long-term losses resulting from the under-pricing of the products sold. It is highly unlikely that any South Jersey bank or private investor, no matter how high venturer he might be, would willingly have gone into competition with respondents' long purse and ability to recoup retail investment losses at the manufacturing level. In any event, respondents never produced evidence that any private venturer was willing to do this.

B.

If the court of appeals is right, and respondents' conduct was "reasonable" and therefore not in violation of Section 1, then the shrinking opportunities for private capital and private entrepreneurs will shrink further at an accelerated rate, not just among Dodge dealers in South Jersey, but among all automobile dealers everywhere, including the members of *amicus*, and among dealers in all oligopolistically controlled industries.

As a consequence, profits now being earned, or which otherwise would be earned, by local enterprises, which nourish the economic and cultural life and the independence of our communities, will be sucked out of the communities and into the treasuries of the national manufacturers, with likely devastating effect on those communities.

From the viewpoint, therefore, of the membership of *amicus* and all similarly situated individual businessmen, and from the viewpoint of all who value or have a stake in independence in the lives of our communities, the decision below presents a great danger and is of great public importance.

Therefore, the questions raised by the petition merit review by this Court.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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Attorney for Amicus Curiae